

No. 15716

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United States  
Court of Appeals  
for the Fifth Circuit

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BEVERLY B. BISTLINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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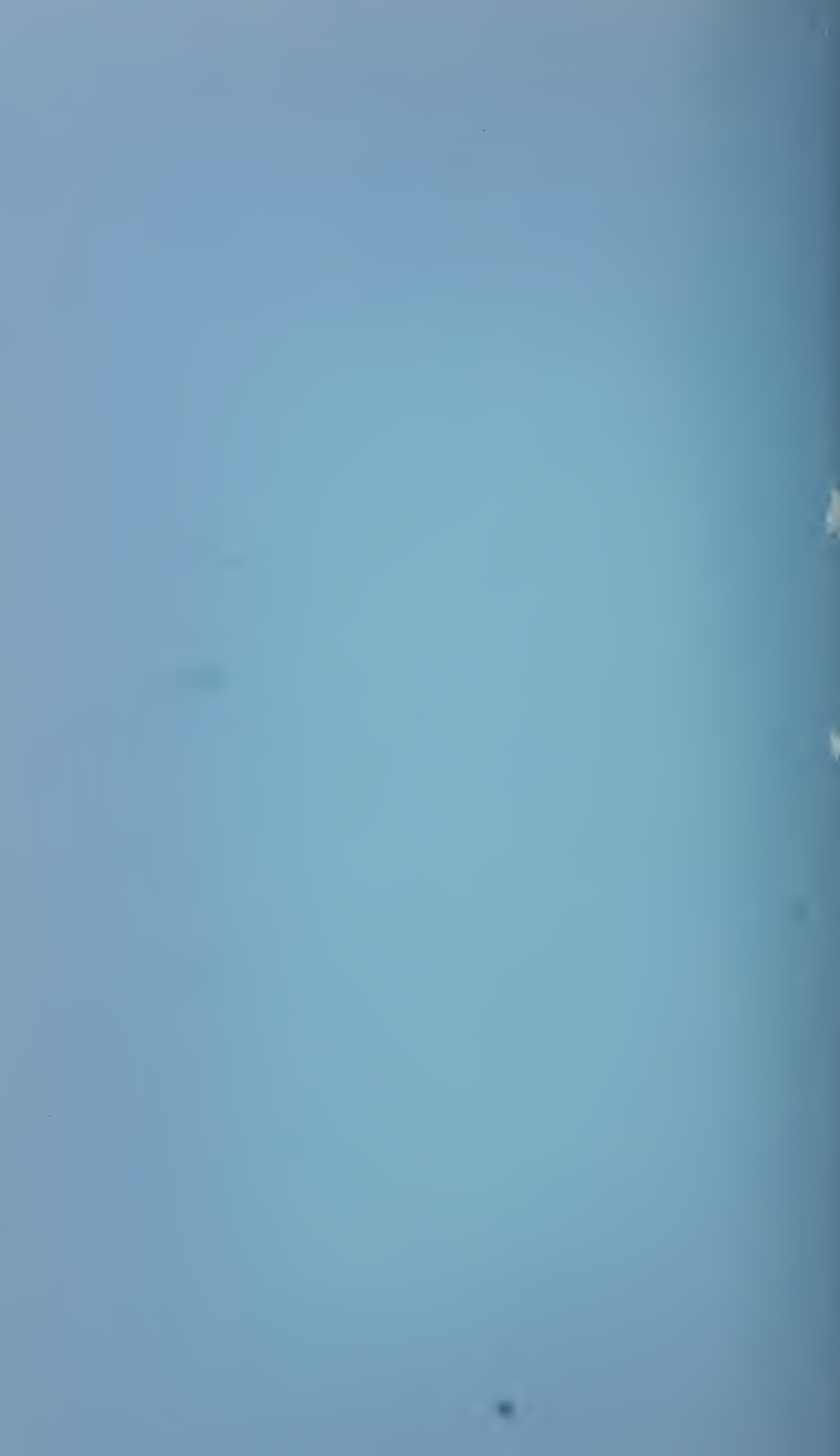
Transcript of Record

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Appeal from the United States District Court  
for the District of Idaho,  
Eastern Division.

FILED

DEC 9 1957



No. 15716

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United States  
Court of Appeals  
for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellee.





In the District Court of the United States of America  
for the District of Idaho, Eastern Division

No. 1884

BEVERLY B. BISTLINE & A. R. SPAULDING,  
Plaintiffs,

vs.

UNITED STATES OF AMERICA,  
Defendant.

### COMPLAINT

For cause of action against the defendant, plaintiff alleges:

#### I.

This action arises under the Internal Revenue Laws of the United States of America and more particularly the provisions thereof authorizing actions for the recovery of income tax unlawfully collected.

#### II.

That at all times hereinafter mentioned, the defendant, United States of America, was, and now is, a corporation sovereign and a body politic.

#### III.

That plaintiff was during all of the year 1947 a single person.

#### IV.

That on or before the 15th day of March, 1948, plaintiff herein, filed an income tax return on Form

1040 for the year 1947 in the office of the Collector of Internal Revenue for the District of Idaho, showing among other things, that in the calendar year 1947 she disposed of certain capital assets held for more than six months, which were reported in Schedule D of said return in words and figures as follows:

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Sale Price	5. Cost	6. EOS & COI	7. Dep.	8. Gain
Vacant Lots S $\frac{1}{2}$ 9 and 10, Block 274, Pocatello .....	1939	9-27-47	\$1,000	\$150	.....	.....	\$ 850.00
Vacant Lots, L. 15 and 16, Block 356..	1937	2- 5 -47	1,500	100	.....	.....	1,400.00
Vacant Lots, Lot 17 and S $\frac{1}{2}$ 18, Block 519, Pocatello .....	1936	7-15-45	1,000	300	.....	.....	700.00

#### V.

That plaintiff had a total profit on the sale of said capital assets of \$2,950.00, from which she realized a long term capital gain in the amount of 50% thereof to wit, \$1,475.00, which was included in plaintiff's net return for the year 1947 and all lawful taxes thereon were duly paid.

#### VI.

That the Commissioner of Internal Revenue erroneously ruled that said sum of \$2,950.00 was not a capital gain, but resulted from the disposal of property held by the plaintiff primarily for sale to customers in the ordinary course of her trade or business.

## VII.

That thereupon the Commissioner assessed an additional tax against plaintiff in the sum of \$396.54, same being the amount of additional tax for which plaintiff was liable if all of said sum of \$2,950.00 was taxable as ordinary income.

## VIII.

That thereafter on June 22, 1951, plaintiff paid said defendant said assessment of \$396.54, and lawful interest thereon from March 15, 1948, to May 31, 1951, in the amount of \$71.47 and a 5% penalty in the sum of \$19.80 making a total of \$487.81, paid by plaintiff to the defendant as a result of said erroneous ruling of said commissioner of Internal Revenue.

## IX.

That on March 4, 1952, plaintiff duly filed a claim for said refund of said additional tax and interest, a copy of which said claim is hereto annexed and marked "Exhibit A" and by reference made a part hereof. That said claim for refund was disallowed on April 8, 1953, and notice thereof received by plaintiff by registered mail on April 11, 1953.

## X.

Plaintiff alleges that said gain of \$2,950 was realized from the sale of her capital assets held more than six months and that she has been unlawfully denied the right accorded by the Statutes in such cases made and provided to pay her income tax on

one-half of said gain, to wit: \$1,475.00, and that by reason thereof the defendant owes this plaintiff \$487.41 for money had and received from the plaintiff on June 22, 1951, together with interest thereon at the rate of 6% per annum from June 22, 1951.

For a Second Cause of Action Against  
Defendant, Plaintiff Alleges:

I.

This action arises under the Internal Revenue Laws of the United States of America and more particularly the provisions thereof authorizing actions for the recovery of income tax unlawfully collected.

II.

That at all times hereinafter mentioned defendant, United States of America, was, and now is, a corporation sovereign and a body politic.

III.

That on June 28, 1948, plaintiff and A. R. Spaulding were married and continued to be husband and wife throughout the remainder of the year 1948, and until on or about September 15, 1949, at which time said marriage was dissolved by decree of divorce; that for the year 1948, plaintiff and her then husband, A. R. Spaulding, filed a joint income tax return on form 1040; that the assets hereinafter mentioned as being sold by plaintiff during said year 1948 were at the time of the sale thereof the separate property of plaintiff and the gain thereon

was her separate property, and that any income tax to which she may be entitled by way of refund is her separate property; that said A. R. Spaulding has assigned over to plaintiff any and all right to claim for refund of the taxes paid on the gain on the sale of said assets.

IV.

That on or before the 15th day of March, 1949, plaintiff herein filed an income tax return on form 1040 for year 1948 in the office of the Collector of Internal Revenue for the District of Idaho, showing among other things, that in the calendar year 1948 she disposed of certain capital assets held for more than six months, which were reported in Schedule D of said return in words and figures as follows:

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Sale Price	6. Cost	7. Exp. Sale	8. Gain
Vacant lots, Block 26, Block 44, Block 27 (except lot 17), and Lots 19 and 20, Block 21, Pocatello Townsite	1939 to 1943	5-20-48	\$16,400.	\$1,500.00	.....	\$14,900.00
Lots 1/2 6 and 7, Block 52	1943	6-17-48	750.	150.00	\$50.00	550.00
Lots 4-17, incl.; Block 2, Lots 1 and 3; Block 3, Lots 5, 6, 7, 10, and 13-19, incl.; Block 54; all of Block 6, Pocatello Townsite	..... 1939	5-20-48	1,900.	200.00	.....	1,800.00
Lots 11-14, incl., Block 50	..... 1940	1948	2,100.	201.75	.....	1,898.75
						\$19,148.75

## V.

That plaintiff had a total profit on the sale of said capital assets of \$19,148.75 from which she realized a long term capital gain in the amount of 50% thereof, to wit: \$9,574.37 which was included in plaintiff's net return for the year 1947 and all lawful taxes thereon were duly paid.

## VI.

That the Commissioner of Internal Revenue erroneously ruled that said sum of \$19,148.75 was not a capital gain, but resulted from the disposal of property held by the plaintiff primarily for sale to customers in the ordinary course of her trade or business.

## VII.

That thereupon the Commissioner assessed an additional tax against plaintiff in the sum of \$2,787.42 same being the amount of additional tax for which plaintiff was liable if all of said sum of \$19,147.75 was taxable as ordinary income.

## VIII.

That thereafter on June 22, 1951, plaintiff paid said defendant said assessment of \$2,787.42 and lawful interest thereon from March 15, 1949, in the amount of \$334.39 and a 5% penalty of \$139.45 making a total of \$3,261.26 paid by plaintiff to the defendant as a result of said erroneous ruling of said Commissioner of Internal Revenue.

## IX.

That on March 4, 1952, plaintiff duly filed a claim for said refund of said additional tax and interest,

a copy of which said claim is hereto annexed and marked "Exhibit B" and by reference made a part hereof. That said claim for refund was disallowed on April 8, 1953, and notice thereof received by plaintiff by registered mail on April 11, 1953.

X.

Plaintiff alleges that said gain of \$19,147.75 was realized from the sale of capital assets held more than six months and that she has been unlawfully denied the right accorded by the Statutes in such cases made and provided to pay her income tax on one-half of said gain, to wit: \$9,574.37, and that by reason thereof the defendant owes this plaintiff the sum of \$3,621.86 for money had and received from the plaintiff on June 22, 1951, together with interest thereon at the rate of six per cent per annum from June 22, 1951.

Wherefore, plaintiff prays judgment on her first cause of action for the sum of \$487.41 together with interest thereon at the rate of 6% per annum from June 22, 1951, and on her second cause of action for the sum of \$3,621.86 together with interest thereon at the rate of 6% per annum from June 22, 1951, and such other and further relief as may be proper in the premises and costs.

BISTLINE & BISTLINE,  
Attorneys for Plaintiff;

By /s/ F. M. BISTLINE,  
Residing at Pocatello, Idaho.

EXHIBIT A

Form 843  
U. S. Treasury Department  
Internal Revenue Service

Claim

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form

Refund of Taxes Illegally, Erroneously, or Excessively Collected

Collector's Stamp (Date received) : [Blank.]

State of Idaho,  
County of Bannock—ss.

Name of taxpayer or purchaser of stamps : Beverly B. Bistline.  
Street address : Rooms 204-208 Dietrich Building, Pocatello, Idaho.

City, postal zone number, and State : 351 North Garfield Avenue, Pocatello, Idaho.

1. District in which return (if any) was filed : Idaho.

\* \* \*

3. Kind of tax : Income tax for year 1947.

4. Amount of assessment : \$1,533.65; dates of payment : 3-15-48, 5-31-51.

\* \* \*

6. Amount to be refunded : \$396.54.

\* \* \*

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code, on May 31, 1953.

The deponent verily believes that this claim should be allowed for the following reasons :

Taxable Net Income for year 1947 on which claimant paid tax per Form 1302, Sched. 2 attached to Rev. Agent. Report (Lloyd T. Ralphs) dated February 21, 1950 .....\$6,847.89



Less capital gains from sales of real estate held by taxpayers for more than 6 months, treated as ordinary income on R.A.R. 2-21-50 .....	1,475.00
	<hr/>
Credited Income .....	\$5,372.89
Income Tax Paid .....	\$1,533.65
Income Tax as Same Should be Corrected	1,137.11
	<hr/>
Amount to be Refunded .....	\$ 396.54
	<hr/> <hr/>

Reasons: See attached sheet.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: February, 1952.

/s/ BEVERLY B. BISTLINE.

Reasons: The sales which the Revenue Agent set up as Ordinary Gain consisted of vacant lots in Pocatello, Idaho, which taxpayer had acquired from her parents as a gift. Taxpayer during all of the year 1947 was in the Waves till June 1, and thereafter was employed in the capacity of Cashier and Office Manager of the Pocatello Transit Company at Pocatello, and was in no way engaged in the real estate business. She was not licensed, had no office, did not advertise, and did nothing toward making them marketable, just held them. No special effort was made by anyone to sell them—they were sold to buyers who searched out the lots and the owner.

Said Property Was Not Held by Taxpayer for Sale to Customers in the Ordinary Course of Her Trade or Business.

I hereby declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ BEVERLY B. BISTLINE.

## EXHIBIT B

Form 843  
U. S. Treasury Department  
Internal Revenue Service

### Claim

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form

Refund of Taxes Illegally, Erroneously, or Excessively Collected

Collector's Stamp (Date received): [Blank.]

State of Idaho,  
County of Bannock—ss.

Name of taxpayer or purchaser of stamps: Beverly B. Bistline.  
Business address: 204-208 Dietrich Building, Pocatello, Idaho.  
Residence: 351 North Garfield, Pocatello, Idaho.

1. District in which return (if any) was filed: Idaho.

\* \* \*

3. Character of assessment or tax: Income tax for year 1948.

4. Amount of assessment: \$5,171.60; dates of payment: 4-11-48 and 6-27-51.

\* \* \*

6. Amount to be refunded: \$2,787.42.

\* \* \*

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code, on 6-27-53.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxable Net Income for the year 1948 on which claimant and her then husband, A. R. Spaulding, paid tax per Form 1302, Sched. 2 attached to Rev. Agent Report (Walter H. Wilson) April 4, 1950.....	\$21,690.22
Less capital gains from sales of real estate held by taxpayer, Beverly B. Bistline, for more than six months, treated as ordinary income on R.A.R. April 5, 1940 .....	9,574.37
	<hr/>
Income tax paid .....	\$5,171.60
As same should be corrected .....	2,384.18
	<hr/>
Amount to Be Refunded .....	\$2,787.42

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: ....., 19.....

/s/ BEVERLY B. BISTLINE.

Reasons: The sales which the Revenue Agent set up as

Ordinary Gain consisted of vacant lots in Pocatello, Idaho, which taxpayer had acquired from her parents as a gift. Taxpayer during all of the year 1948, was employed in the capacity of Cashier and Office Manager of the Pocatello Transit Company at Pocatello, and was in no way engaged in the real estate business. She was not licensed, maintained no office, did not advertise the lots for sale, and did nothing toward making them marketable—just held

them. No special effort was made by anyone to sell them, they were sold to buyers who came to taxpayer to purchase them and kept after her till a sale was made.

In the case of the Lots in Blocks 26, 27 and 44—Taxpayer was in Knoxville, Tennessee, when a call was received over the telephone asking if they could be purchased; that certain interests had taken an option on ground in adjacent Alameda and that the Mayor and Chamber of Commerce wanted to get the property into Pocatello, and asked taxpayer to hold them until they could negotiate with her for their sale. Sale was made under the circumstances of the upbuilding of the community and not in ordinary circumstances. Said Property Was Not Held by Taxpayer for Sale to Customers in the Ordinary Course of Her Trade or Business at Any Time.

[Endorsed]: Filed March 7, 1955.

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[Title of District Court and Cause.]

#### MOTION TO ADD PARTY

Now comes the defendant, United States of America, by its attorney, Sherman F. Furey, Jr., United States Attorney for the District of Idaho, and moves the Court, pursuant to Rule 19(a) of the Rules of Civil Procedure, to join A. R. Spaulding, 211 North 8th, Boise, Idaho, as a party plaintiff to this action.

This motion is made for the reason that this action is brought by the plaintiff, Beverly B. Bistline,

for a refund of income taxes, penalty and interest paid for the year 1948; that Beverly B. Bistline and A. R. Spaulding filed a joint income tax return for 1948 as husband and wife and, their liability for income tax for 1948 being joint, they should both be parties plaintiff to this action to avoid the possibility of more than one action for the taxes herein sued for.

/s/ JOHN T. HAWLEY,  
Asst. United States Attorney.

[Endorsed]: Filed May 9, 1955.

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[Title of District Court and Cause.]

### ORDER

The Motion to Add Party, heretofore filed by the defendant United States of America, having come on for hearing and good cause appearing for the granting of the relief therein prayed;

It Is, Therefore, Ordered that A. R. Spaulding, 211 North 8th, Boise, Idaho, be made a party plaintiff in this action.

Dated this 18th day of May, 1955.

/s/ FRED M. TAYLOR,  
Judge, U. S. District Court.

[Endorsed]: Filed May 18, 1955.



ing two copies via registered mail to the Attorney General, Washington, D. C.

SAUL H. CLARK,  
United States Marshal.

Marshal's Fees

Travel .....	\$ none
Service .....	2.00

[Endorsed]: Filed March 15, 1955.

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[Title of District Court and Cause.]

ANSWER

The defendant by its attorney, Sherman F. Furey, Jr., United States Attorney for the District of Idaho, answers the plaintiff's complaint as follows:

1. The defendant denies the allegations contained in paragraph I, except to admit that this action has been brought under the Internal Revenue Laws of the United States of America for the recovery of income taxes lawfully assessed and collected from the plaintiff.

2. The defendant admits the allegations of paragraph II.

3. The defendant admits the allegations of paragraph III.

4. The defendant denies the allegations contained in paragraph IV except to admit that plaintiff filed

an individual income tax return, form 1040, for the year 1947, with the Collector of Internal Revenue for the District of Idaho, on March 15, 1948, and to further admit that the said return reported the sale of certain real estate described in paragraph IV.

5. The defendant denies the allegations contained in paragraph V.

6. Defendant denies the allegations contained in paragraph VI, except to admit that the Commissioner of Internal Revenue determined that income received by plaintiff during the year 1947 from the sale of certain real estate was not taxable as a capital gain as reported by plaintiff on her 1947 individual income tax return, but that the said income was taxable as ordinary income.

7. The defendant denies the allegations contained in paragraph VII except to admit that plaintiff was assessed a deficiency in income taxes for the year 1947 in the amount of \$92.73 which amount was duly paid together with interest thereon in the amount of \$16.75 on or about about May 24, 1951.

8. At the present time the defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph VIII.

9. The defendant denies the allegations contained in paragraph IX except to admit that plaintiff filed a claim for refund of income taxes for the year 1947 on or about March 3, 1952, and that said claim for refund was disallowed on April 8, 1953. Defendant further denies each and every allegation contained in



said claim for refund which is not otherwise expressly admitted in this answer.

10. The defendant denies each and every allegation contained in paragraph X.

Defendant Answers the Second Cause of Action Alleged by the Plaintiff as Follows:

1. The defendant denies the allegations contained in paragraph I, except to admit that this action has been brought under the Internal Revenue Laws of the United States of America for the recovery of income taxes lawfully assessed and collected from the plaintiff.

2. The defendant admits the allegations of paragraph II.

3. The defendant denies each and every allegation contained in paragraph III, except to admit plaintiff and her then husband, A. R. Spaulding, filed a joint individual income tax return, Form 1040, for the year 1948, with the Collector of Internal Revenue, District of Idaho, on or about April 11, 1949.

4. The defendant denies each and every allegation contained in paragraph IV except to admit that on or about April 11, 1949, the plaintiff filed a federal income tax return, Form 1040, for the year 1948 with the Collector of Internal Revenue for the District of Idaho.

5. The defendant denies each and every allegation contained in paragraph V.

6. The defendant denies the allegations contained in paragraph VI, except to admit that the Commissioner of Internal Revenue determined that income received by plaintiff from the sale of certain real estate during the year 1948 was not taxable as capital gain but was taxable as ordinary income for that year.

7. The defendant denies the allegations contained in paragraph VII except to admit that plaintiff and her then husband were assessed a deficiency of \$3,864.34 in federal income taxes for the year 1948.

8. At the present time the defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph VIII, except that it is denied that any of the Commissioner's rulings were erroneous.

9. The defendant denies the allegations contained in paragraph IX except to admit that on or about March 3, 1952, plaintiff filed a claim for refund of income taxes for 1948, with the Collector of Internal Revenue for the District of Idaho, and that said claim for refund was disallowed on April 8, 1953. Defendant further denies each and every allegation contained in the aforesaid claim for refund which is not otherwise expressly admitted in this answer.

10. The defendant denies each and every allegation contained in paragraph X.

Wherefore, the defendant having answered prays that judgment be entered dismissing the plaintiff's complaint with prejudice, and that the defendant be

awarded its costs and other relief which to the court may seem just and proper.

/s/ JOHN T. HAWLEY,  
Asst. United States Attorney.

[Endorsed]: Filed May 9, 1955.

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[Title of District Court and Cause.]

### MEMORANDUM OPINION

The plaintiff brings this suit against the United States to recover income taxes alleged to have been erroneously assessed and collected. Pursuant to a motion by the United States an order was entered naming A. R. Spaulding, plaintiff's former husband, a party plaintiff; Spaulding, however, made no appearance in this action.

This Court's jurisdiction is based on 28 U.S.C.A. § 1346 (a) (1).

The issue in this case is whether profits realized by the taxpayer from the sale of real estate in the years 1947 and 1948 were properly taxed as ordinary income. The determination of this question depends upon whether the property sold was capital assets within the meaning of § 117 of the Internal Revenue Code of 1939, 26 U.S.C.A. §117, or whether it was excluded as constituting "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

On July 1, 1947, the taxpayer's parents transferred approximately 200 lots of improved and unimproved real estate in and near the city of Pocatello, Idaho, to her by means of two gift deeds. The taxpayer, 24 years of age at the time the deeds were executed, was employed as the business manager of the Pocatello Transit Company, one of her father's business enterprises, which owned and operated buses in Pocatello. One of the said deeds was filed for record on July 15, 1947; the other was recorded on August 13, 1947.

The taxpayer immediately began to dispose of this property. She sold two lots on August 5, 1947. Later in the year, in two separate sales, she sold three more lots. Her net gain on all these sales amounted to \$2,950. She reported a long-term capital gain of \$1,475, and paid taxes on the same for the year 1947. Four sales were consummated in 1948, in which the taxpayer disposed of a total of 103  $\frac{1}{2}$  lots, plus all of Block 6 in Pocatello, Idaho, for a net gain of \$19,148.75. She treated this sum as a long-term capital gain, and paid taxes on fifty per cent of the same, or \$9,574.37.

The Internal Revenue Service determined that the property involved in the said sales in 1947 and 1948 had been held primarily for a sale to customers in the ordinary course of the taxpayer's business, and assessed additional taxes in the amount of \$396.54 for the year 1947, and \$2,787.42 for the year 1948. After protest, denial thereof and payment of the taxes as assessed, and the filing of claims for refund

and the denial of the same, the taxpayer filed this action.

Property held by a taxpayer primarily for sale to customers in the ordinary course of his trade or business is expressly excluded from the statutory definition of capital assets. Section 117 (a) (1), Internal Revenue Code of 1939, 26 U.S.C.A. § 117 (a) (1). Whether property sold by a taxpayer comes within the scope of this exception is essentially a question of fact to be determined from the facts of each case. *Stockton Harbor Industrial Company vs. Commissioner*, 9 Cir., 216 F. 2d 638, 650 certiorari denied 349 U.S. 904, 75 S.Ct. 581, 99 L.Ed. 1241; *Cohn vs. Commissioner*, 9 Cir., 226 F. 2d 22, 24.

The Court of Appeals for the Ninth Circuit has declared that the facts necessary to create the status of one engaged in a "trade or business" revolve largely around the frequency or continuity of the transactions claimed to result in a "business" status. *Ehrman vs. Commissioner*, 9 Cir., 120 F. 2d 607, 610. In *Rollingwood Corporation vs. Commissioner*, 9 Cir., 190 F. 2d 263, the Court of Appeals stated, at 266, as follows:

"While the purpose for which the property was acquired is of some weight the ultimate question is the purpose for which the property is held. Richards vs. C. I. R., 9 Cir., 81 F. 2d 369, 106 A.L.R. 249. Most of the cases dealing with the problem of whether property is held primarily for sale to customers in the ordinary

course of trade or business involve situations where the taxpayer is engaged in some activity apart from his usual occupation and the question is whether this activity amounts to a business. The test normally applied in these situations is the frequency and continuity of the transactions claimed to result in a trade or business. Applying that test to the facts of the instant case we have no difficulty in finding support in the record for the finding that Rollingwood is in the business of selling real property." (Emphasis added.)

See, also: *Palos Verdes Corp. vs. United States*, 9 Cir., 201 F. 2d 256, 258-259; *Stockton Harbor Industrial Company vs. Commissioner*, *supra*.

When the standard provided by the Ehrman case is applied to the facts in the case at bar, it is clear that the taxpayer was in the business of selling real property. She made her first sale approximately five weeks after receiving the gift deeds from her parents, participated in seven real estate transactions during an eleven-month period, and sold a total of 108 1/2 lots, as well as an entire city block, for a net gain of \$22,098.75. This property was not capital assets within the meaning of § 117 of the Internal Revenue Code of 1939, 26 U.S.C.A. § 117, and the Internal Revenue Service correctly treated the gains from the said sales as ordinary income.

“The capital gains provisions are remedial provisions. Congress intended to alleviate the

burden on a taxpayer whose property has increased in value over a long period of time from having the profits from sales taxed at graduated tax rates designed for a single year's income. The purpose is to protect 'investment property' as distinguished from 'stock in trade,' or property bought and sold for a profit. It is our view that this policy was not meant to apply to a situation where one of the essential purposes in holding the property is sale." *Rollingwood Corporation vs. Commissioner, supra.*

The taxpayer has the burden of proving that the particular properties sold during 1947 and 1948 were held primarily for investment rather than primarily for sale. *Cohn vs. Commissioner, supra.* She has not met that burden. The recovery sought is, therefore, denied.

Counsel for defendant may prepare findings of fact, conclusions of law and a proposed judgment, serve copies thereof upon counsel for the plaintiff and submit originals to the Court for its approval.

Dated this 1st day of November, 1956.

/s/ FRED M. TAYLOR,

United States District Judge.

[Endorsed]: Filed November 2, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause was tried before the Court on May 3, 1956, at Pocatello, Idaho. F. M. Bistline and Beverly B. Bistline appearing as counsel for the plaintiff. Sherman F. Furey, Jr., United States District Attorney for the District of Idaho; Marion Callister, Assistant United States District Attorney for the District of Idaho, and Arthur L. Biggins, Attorney, Tax Division, Department of Justice, appearing as counsel for the defendant. Witnesses were sworn and testified, and documentary evidence was introduced on behalf of the respective parties. At the conclusion of the trial counsel waived oral argument, and upon agreement it was ordered that briefs be submitted to the Court. The Court having considered the evidence, briefs of counsel, and being fully advised in the premises, makes and files herein its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

1. Beverly B. Bistline is a resident of Pocatello, Idaho.
2. Beverly B. Bistline filed timely income tax returns for the years 1947 and 1948 and reported thereon the profit realized from the sale of certain real estate as long-term capital gains.
3. After review of plaintiff's income tax returns for 1947 and 1948, the Commissioner of Internal



Revenue determined that the profits realized from the sale of these properties was taxable as ordinary income for federal income tax purposes. He subsequently assessed and collected additional income taxes for 1947 in the amount of \$396.54 and \$2,787.42 for 1948.

4. On July 1, 1947, the parents of Beverly Bistline transferred approximately 200 lots of improved and unimproved real estate in and near the City of Pocatello, Idaho, to her by means of two gift deeds. These deeds were filed for record on July 15, 1947, and on August 13, 1947.

5. At the time of this transfer (July 1, 1947), Beverly Bistline was 24 years of age and employed as the business manager of the Pocatello Transit Company, one of her father's business enterprises.

6. Soon after receipt of these properties, Beverly Bistline began to sell the same, the first of which properties were sold on August 5, 1947. During 1947 she sold five lots for a net profit of \$2,950. During 1948 she sold 123 1/2 lots for a net profit of \$19,148.75.

7. F. M. Bistline, the father of Beverly, negotiated the sale of all these properties subject to her counsel and consent. Along with his practice of law and management of sundry business enterprises, F. M. Bistline was engaged in the selling, dealing in and with real estate during the years 1947 and 1948.

8. After Beverly Bistline received this real estate from her parents, she was frequently and con-

tinuously engaged in the negotiation and/or consummation of the sale of her properties. That said real estate was held by plaintiff primarily for sale to customers, and was not being held as an investment.

9. Pursuant to a motion by the United States, A. R. Spaulding, the former husband of Beverly Bistline, was made a party plaintiff to this action. Spaulding made no appearance, however, in the trial of this action.

#### Conclusions of Law

1. The Court has jurisdiction of the parties to and subject matter of this action.

2. The frequency, continuity and substantiality of the real estate sales transactions constituted a "business activity" within the general meaning and usage of said term.

3. The real estate sold by plaintiff during 1947 and 1948 was held by her primarily for sale to customers in the ordinary course of her business. The profits realized by the plaintiff from the sale of said properties were taxable as ordinary income for federal income tax purposes.

4. Plaintiff is not entitled to take and have anything by virtue of this action, and defendant is entitled to judgment accordingly.

/s/ FRED M. TAYLOR,

United States District Judge.

[Endorsed]: Filed April 18, 1957.

In the United States District Court for the  
District of Idaho

Civil No. 1884

BEVERLY B. BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

Plaintiff having appeared in person by her attorneys, F. M. Bistline and Don R. Bistline, and the defendant having appeared by Arthur L. Biggins, Attorney, Tax Division, Department of Justice, and the Court having considered the evidence presented, and the pleadings, stipulation and briefs filed,

It Is Hereby Ordered and Adjudged that this action be dismissed on the merits and the defendant allowed his costs.

Dated at Boise, Idaho, this 14th day of June, 1957.

/s/ FRED M. TAYLOR,

United States District Judge  
for the District of Idaho.

Lodged April 5, 1957.

[Endorsed]: Filed June 14, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Beverly B. Bistline, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 14th day of June, 1957.

/s/ F. M. BISTLINE,

/s/ R. DON BISTLINE,

Attorneys for Appellant,  
Beverly B. Bistline.

[Endorsed]: Filed August 9, 1957.

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In the District Court of the United States for the  
District of Idaho, Eastern Division

Civil Case No. 1884

BEVERLY B. BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NARRATIVE STATEMENT OF  
TESTIMONY AND PROCEEDINGS

The above-entitled cause came on regularly for trial on the 3d day of May, 1956, upon the issues framed by plaintiff's complaint and defendant's an-

swer thereto, R. Don Bistline and F. M. Bistline appearing as counsel for plaintiff-appellant and Arthur L. Biggins, appearing as counsel for respondent.

### Stipulations

Mr. Bistline: It is hereby stipulated by and between counsel for the respective parties that the following statement is a true, correct and accurate statement of the facts therein stated:

#### “I.

“F. M. Bistline and Anne Bistline, husband and wife, and father and mother of the plaintiff, Beverly B. Bistline, executed to said Beverly B. Bistline two gift deeds dated July 1, 1947. One of these deeds was recorded in Book 100 of Deeds at page 226 of the Records of Bannock County, Idaho. It was filed for record August 13, 1947, and conveyed the following described property:

Lots 4-17 inclusive in Block 2;

Lots 1 and 3 in Block 3;

Lots 5, 6, 7, 10 and 13-19 inclusive in Block 5;

All of Block 6 (20 Lots);

Lots 6-10 inclusive and 16 to 20 inclusive in Block 7;

Lots 1-7 inclusive, Block 8;

Lots 2, 3 and 5 in Block 9;

All of Block 11 (20 Lots);

Lots 3-8 inclusive and Lots 11-20 inclusive in Block 21;

All of Block 22 (20 Lots);

Lots 1 and 2 in Block 24;  
Lots 1, 7, 8 and 17 in Block 25;  
Lots 1-10 inclusive and 13-20 inclusive in Block  
26;  
All of Block 27 except Lot 17 (19 Lots); All in  
Pocatello Townsite.

“The other deed was filed for record July 15, 1947, and recorded in Book 100 of Deeds at page 149 of the records of Bannock County, Idaho, and conveyed the following described property:

All of Block 44 (20 Lots);  
Lots 11 and 12 in Block 49;  
Lots 11-14 inclusive in Block 50;  
The Northeasterly One-Half of Lots 1, 2 and 3  
in Block 51;  
Lots 5, 6, 7 in Block 52;  
Lots 5 and 6 in Block 74;  
Lots 7 and 8 in Block 74;  
Lots 8, 9 and 10 in Block 105;  
Lots 13 and 14 in Block 339;  
The North West Half of Lot 9 and all of Lot 10  
in Block 274;  
Lots 19 and 20 in Block 356;  
Lots 1, 2 and 3 in Block 360;  
Lots 13 and 14 in Block 380; [2\*]  
The Northwesterly 5 feet of Lot 17 and all of  
Lots 18, 19 and 20 in Block 467;  
Lots 13 and 14 in Block 468;  
Lots 7-18 inclusive in Block 494;

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\*Page numbering appearing at top of page of original Certified Transcript of Record.

Lot 17 and the Southwest Half of Lot 18 in Block 516; All in Pocatello Townsite, Bannock County, Idaho.

An undivided one-half interest in the Southwest-erly 70 feet of Lots 11, 12, 13 and Southeasterly 20 feet by 70 feet of Lot 14 in Block 234 of Pocatello Townsite, on which was located a three-unit apartment, in Pocatello Townsite.

Lots 5, 6, 7 and 8 in Block 1 of Victory Park Townsite on which was located a duplex. This property is in Alameda, Bannock County, Idaho.

#### “II.

At the time the deeds were executed plaintiff was 24 years old and was employed as business manager of the Pocatello Transit Company, which owned and operated the transit buses in the City of Pocatello. This was full-time employment. Her occupation for five years immediately preceding this was that of student at the University of Idaho, from which she graduated in 1943. She took up the duties of business manager of the transit lines immediately on graduation. This employment was interrupted by military service in the Waves during World War II, from which she was discharged as of July 1, 1947. She immediately returned to Pocatello and resumed her duties as business manager of the Pocatello Transit Company.

#### “III.

During the year 1947, the following sales were made:

1. August 5, 1947: Lots 19 and 20 in Block 356 to Kenneth Draper for \$1,500.00 and a net gain of \$1,400.00. This was reported as a long-term capital gain of \$700.00. This property was acquired by F. M. Bistline in 1937.

2. September 27, 1947: The South Half of Lot 9 and Lot 10 in Block 274 to Thomas J. Coates for \$1,000.00 and a net gain of \$850.00. This was reported as a long-term capital gain of \$425.00. This property was acquired by F. M. Bistline in 1939.

3. . . . ., 1947: Lot 17 and South Half of Lot 18 in Block 519 to Albert Anderson for \$1,000.00 and a net gain of \$700.00 reported on long-term capital gain basis of \$350.00. This was acquired by F. M. Bistline July 15, 1945.

#### “IV.

Plaintiff paid taxes for the year 1947, on \$1,475.00 on the three sales mentioned above. In January, 1950, her books were examined by an Internal Revenue Agent, who determined that these transactions were taxable as income rather than ordinary long-term capital gains as reported, and required her to pay tax on an additional \$1,475.00, holding the said property was held by her for sale to customers in the ordinary course of her trade in business. Plaintiff protested to the Commissioner, who denied [4] her protest. She then paid the tax on this item and claimed a refund, and the refund was denied by the Internal Revenue Bureau. The claim to refund is attached to plaintiff's complaint as Exhibit A, she



claimed therein that she was entitled to a refund of \$396.54. This suit is for the recovery of this amount, plus interest thereon from the date of the payment and is the subject matter of her first cause of action.

“V.

During the year 1948 the following sales were made which are subject to the second cause of action:

1. January 12, 1948: Lots 11-14, inclusive, in Block 50 to H. A. Peterson for \$2,100.00 for a net gain of \$1,898.75, which was reported on the long-term capital gain basis in the amount of \$949.47. This property was acquired by F. M. Bistline in 1940.

2. May 20, 1948, to Pocatello Heights, Inc., all of Block 26, 44, 27 (except Lot 17) and Lots 19 and 20 of Block 21, a total of 61 Lots for \$16,400.00 and a net gain of \$14,900.00, which was reported as a long-term capital gain of \$7,450.00. This property was acquired by F. M. Bistline in 1939.

3. May 20, 1948: Lots 4-17, inclusive, of Block 2, Lots 1 and 3 of Block 3; Lots 5, 6, 7 and 10 and 13-19, inclusive, of Block 54, and all of Block 6 to Empire Investment Company (Smith-Marshall) for \$1,900.00 and a net gain of \$1,800.00 which was reported as a long-term capital gain of \$900.00. This was acquired by F. M. Bistline in 1939. [5]

4. July 6, 1948: The South Half of Lot 6 and all of Lot 7 in Block 52 to Edward F. Brick, for a

net gain of \$550.00, which was reported on the long-term capital gain basis in the amount of \$275.00. This was acquired by F. M. Bistline in 1939.

“VI.

That the total amount of gain on the above transactions made in 1948 was \$19,148.75. Plaintiff paid tax on 50 per cent of this amount as a long-term capital gain, in the amount of \$9,574.37. On the examination of the 1948 return the Internal Revenue Agent held that plaintiff was engaged in real estate business and had held the property primarily for sale to customers in the ordinary course of her business, and after protest, denial thereof and payment of the taxes as assessed and the filing of the claim for refund and denial thereof, plaintiff brought this suit for the sum of \$4,787.42, together with interest from the date of payment.”

Does Counsel stipulate these facts?

Mr. Biggins: Counsel so stipulates.

The Court: Very well.”

“Mr. Bistline: It is hereby stipulated that in the event that the plaintiff prevails on her first cause of action in her complaint that she is entitled to capital gain treatment and judgment thereon, that the plaintiff, Beverly B. Bistline, shall be entitled to judgment as prayed in her complaint if all the transactions are held to be capital gains or proportionately in case some are held not to be, subject to the correct mathematical [6] calculation thereof in accordance with the Revenue Laws of the United States pertaining thereto. It is further stipulated

that in the event the plaintiff, Beverly B. Bistline, and the additional plaintiff, A. R. Spaulding, prevail on the contention that the sales of the Beverly B. Bistline property set forth in her second cause of action are capital gains and entitled to capital gain treatment and judgment therein, that the plaintiffs, Beverly B. Bistline and A. R. Spaulding, should be entitled to judgment as prayed in the second cause of action if all transactions are held to be capital gains and proportionately if otherwise, subject, however, to the correct mathematical calculations thereon in accordance with the Revenue Laws of the United States pertaining thereto. Does counsel stipulate to that?

“Mr. Biggins: So stipulated.”

## PLAINTIFF'S CASE IN CHIEF

### Examination

By F. M. Bistline:

(All witnesses were duly sworn before testifying.)

O. R. BAUM

witness for plaintiff, testified as follows:

I am an attorney at law and have been since 1912. I am familiar with the property on which the Pocatello Heights apartments now stand, same being Block 44, 26 and 27 of Pocatello Townsite. I inspected these Blocks in 1947 with J. R. Simplot and Mr. Ott Powers, the manager of the fertilizer division located at Pocatello and C. H. Elle, the con-

tractor, who later built the apartments. We visited a number of sites and this was among them.

The purpose of visiting these sites was because Mr. Simplot [7] advised me that he desired to build what they called a "608," that he had had some men out and they wanted a location in Pocatello, and he or Mr. Powers, I don't know which, was in the office and we got hold of Mr. Elle and I accompanied them on that trip. After looking at the sites we ascertained who were the owners of them and subsequently attempted to contact the owners. I thought you were the owner of these lots. It may have been Beverly, I don't know about that. I reported that the Bistline family owned them and I was directed to contact you. I found you were out of town, down in Tennessee somewhere, and I tried to locate you long distance. I called Knoxville and told them you might be with Mr. James P. Pope, who was head of the T. V. A., and later on that night, or the next day, or two, I did reach you long distance with regard to the purchase of these lots. I think I asked you if you wanted to sell them and what the price was. I recall you told me you were coming home, and you would contact me upon your return or words to that effect. On your return you contacted me and subsequently I believe Mr. Haight worked on that sale under my directions. I don't know if he was working for me at that time or whether he was in the Simplot office, but he was in one of the offices and he brought the title to me and I approved the title and subsequently purchased two additional lots that were in the middle of these lots from other parties for Mr. Simplot.

## Cross-Examination

By Mr. Biggins:

I don't know the date. We were in New York about the 9th, Mr. [8] Simplot and I, and it was some time prior to the 9th of November. The 8th is approximately right. I talked to Mr. F. M. Bistline not his daughter. I know I chased him all over Tennessee trying to find him, but I don't think I had any occasion to talk to Beverly. I called F. M. Bistline. Knowing him as I did I naturally would talk to him, and when he came back he is the one that negotiated with me. He negotiated with Haight, and I think I ultimately closed the deal or the sale with Mr. Simplot. I do not know how the check was made out when the sale was closed. It was in his name, I wouldn't know. I wouldn't have any way of knowing. I couldn't say whether I saw Beverly during the course of the negotiations, at least I didn't talk to her. I saw her every day, but I don't know when. As to whether there was considerable dickering about the option price, I remember talking to Mr. Bistline and telling him that we had to have those other two lots, which were right in the middle of these lots Mr. Bistline had, and a man by the same name that lives in Pittsburgh or Philadelphia had them, and for some reason Mr. Bistline didn't want to or couldn't deal with him—I don't know, but I was directed by the Simplot organization to take it up with him and I talked to him on the phone. His son worked for this National Union and title or consent for title came through the Pacific

Supply Company which is affiliated with the National Union or something, and anyway it was a considerable number of months, I wouldn't say months, but considerable time before the deal was completed, and Mr. Simplot was here and in those days Westvaco was coming and was quite active, and I [9] wouldn't recall any particular dates.

#### Recross-Examination

By Mr. Bistline:

I probably mentioned something in a conversation with Mr. Bistline when he was in Tennessee that the Mayor or Chamber of Commerce was quite interested in getting this property into Pocatello rather than Alameda, but I wouldn't remember that. I remember after the news got out that Westvaco was interested in coming and I don't recall just what was said now. Like I say, I remember after the news got out that Westvaco was interested in coming and this apartment thing might be built, but I don't recall just what was said.

#### MRS. H. A. PETERSON

called as a witness, testified as follows:

#### Direct Examination

By Mr. Bistline:

I have lived at 1524 E. Lander in Pocatello since December 10, 1948. My husband is not living. He was in 1947 and 1948.

I do not know from whom we purchased certain

property in 1948—I think it was Mr. Marshall that made the sale to us, if I am correct. My husband took care of everything at that time. I remember looking at the lots. We lived in the neighborhood and had had our eye on them for a long time. After we concluded it might be well to buy them—it was on account of my son. He wanted to build and he was looking for lots and it seemed as though there were four lots in one. They wouldn't sell them separate and so he came over to Mr. Peterson and wanted to know if he would help him out. He didn't have the money to buy the lot, so Mr. Peterson helped him [10] out and bought the four lots and then we divided the lots up between him and us.

When we first looked at the lots we didn't know who owned them. We subsequently found out. I couldn't tell just how. It was between my son and my husband. They looked around and I know they asked "Hirschberger." Whether he told them who owned them or not I don't know. They subsequently found out the Bistlines owned them. Then my husband bought them. I don't know where he went to complete the sale. I think it was the Bistline Real Estate, or what was it down there on Main right across from the post office. Bistline Realty Company, I think Mr. Marshall was in with them at that time. The sale was subsequently concluded.

## Cross-Examination

By Mr. Biggins:

I remember meeting Mr. Marshall several times. The occasion of meeting him is I just go there and take care of his children at times, that is all, but not at that time—since then. I couldn't tell you how I knew he was the man to see about the sale of this property, but I think it was him that was taking charge of it at the time. It was my understanding. I knew he worked for the Bistline Realty Company.

## THOMAS J. COATES

called as a witness, testified as follows:

## Direct Examination

By Mr. Bistline:

I live at 454 North 4th, Pocatello, and have lived there three years. I am janitor at the Union Pacific Railroad. I have been employed by the Union Pacific for 19 years.

During the year 1947 I inspected some lots on North 6th Avenue [11] with the view to buying them. I don't recall the description now, and at the time I was inspecting the lot I didn't know the number, but I do know it was on 6th and Bridger. I went to the Court House and found out. After I went to the Court House I got in contact with the owner and they sent us to F. M. Bistline and subsequently a contract was signed and the sale made. The contract price was \$1,000 on monthly payments.

Mr. Biggins: No questions.



## CLARICE MITCHELL

called as a witness, testified as follows:

I am the wife of James E. Mitchell of the Mitchell Radio and Appliances. I am employed as assistant auditor in the auditor and record's office at Bannock County. During 1947 I was familiar with the property which is now occupied by Pocatello Heights Apartments. We were looking around for some property to build us a new home and looked at that property. After looking it over we looked up the record in the assessor's office to see who owned it, and I remember of it being in the name of Bistline, and I approached F. M. Bistline one day and asked if he were going to develop that, that we were interested in getting off the east bench somewhere, and he said that he hadn't made up his mind, and I just let it go, and I remember approaching him several times on it in a matter of months or over a period of a year maybe and he still hadn't made up his mind as to what he was going to do with it, but he told me that if he did he would give us first chance at a location there. I subsequently bought a location in that area, when Smith-Marshall opened up College Terrace, we [12] bought a lot up there. In fact we were one of the first up there.

Mr. Biggins: No questions.

## ALBERT ANDERSON

called as a witness, testified as follows:

I live at 1423 North Hayes in Pocatello and my occupation is carpenter. I have lived at that address

29 years. I bought a vacant lot from Mr. Bistline immediately north of my place. I happened to become interested in that lot because they were next door to me and I tried pretty near two years to get it and finally I got it. I first talked to F. M. Bistline about the lot about 15 years ago and it took pretty near two years before a sale could be made.

Mr. Biggins: No questions.

#### EDWARD F. BRICK

called as a witness, testified as follows:

I live at 131 North 15th and have since May, 1950. I bought the lot—lots from Beverly Bistline. I became interested in them in that I had been making a deal on some lots on the north or southeast corner of 15th and Clark near these lots and the deal fell through and I was talking to Mr. Marshall that same day and was telling him about it. I know him personally and he said he thought maybe he knew of some lots in that location and he would look into it, and I was quite interested so I followed it up and I contacted him, there at the office, and in the meantime he found out how much they were and he told me where they were located, and I had gone out and looked at them and there were the three lots there and it was more than I wanted so I arranged to have my father-in-law take a lot and a half and [13] I took a lot and a half, and the sale was ultimately completed.

Beverly Bistline never contacted me with regard to the lots. I never met her until here. After I talked to Mr. Marshall we closed the entire deal.

## Cross-Examination

By Mr. Biggins:

Mr. Marshall was working or was connected with the Smith-Marshall Agency or Bistline Realty. I don't know what the name was then. It is on my contract. I closed the deal the date of July 6, 1948. I contacted Mr. Marshall about a week before. He told me where they were but I don't believe he could quote me a price at that time. He later quoted \$500 a lot for the three lots. The whole transaction from beginning to end was with Mr. Marshall at the Bistline Agency.

BEVERLY B. BISTLINE

plaintiff, testified as follows:

## Direct Examination

By F. M. Bistline:

I am the daughter of F. M. Bistline and Anne Bistline, the plaintiff in this case. I was the donee to certain deeds in 1947 on certain real estate. The deeds were made by F. M. Bistline and Anne Bistline to me. My occupation in 1947 was office manager and vice-president of the Motor Transit Company and my duties consisted of doing all the office work, scheduling bus drivers and keeping my eye on mechanics and just in general ran the bus company. It was full time employment. My occupation for the previous five years: After my graduation at the University of Idaho in 1943, I worked as office manager of the bus company and then I was in the [14]

Waves in the Navy for almost three years. This same employing continued during all of 1947 and until December, 1948, and then I went to work as a legal secretary in the office of Bistline and Bistline.

I never advertised any of the lots for sale. I took no interest in seeking purchasers. I did not have a real estate license. I did not maintain a real estate office. I did not list this property with any real estate broker. I was in Tennessee when O. R. Baum called, and I was present in the Motel in Memphis when he talked to F. M. Bistline in connection with these sales.

F. M. Bistline acted as adviser. He had been experienced for a long time in business and I was inexperienced and I relied on his advice in these matters, and sought his counsel when the problems were presented. I did not sell any of the property without signing the deeds or contracts myself. I never gave a power of attorney to anyone else to sell this property or handle it for me. I did it myself. I was handed the check for the purchase of the land sold to the Simplot Corporation or Pocatello Heights. It was made out to me.

With regard to the other sales Mrs. Peterson testified to and Mr. Coats, I recall they came to us—to me—because I was the owner of the property until negotiations were made and my father and I consulted about the sales and it was decided to make them and I made the sales.

Cross-Examination

By Mr. Biggins:

The Simplot check was made out to me and I endorsed it. I don't [15] remember whether I deposited it in my account or whether I gave it to my father. If my father received that check, which I am sure, I would not say he appropriated it to his own use. My father took care of these matters for me, but it was not without talking to me about it. We would have much conversation about the advisability of whether or not we should sell the property, and we conferred about it, and I mean it was my decision in the end.

Q. (By Mr. Biggins): For instance, after you went down to Utah and to California to school some property was still being sold, wasn't it?

Mr. Bistline: If the Court please, that is way beyond the issues of this case.

The Court: I don't know any reason why Mr. Bistline couldn't be her agent acting for her.

Mr. Biggins: I will cut off this cross-examination if counsel will stipulate he was her agent.

Mr. Bistline: I will stipulate that I was acting as sort of a business agent or adviser. I had no authority to execute conveyances. I was her adviser.

The Court: Then you are stipulating you were acting as her adviser and counselor in making these transactions.

Mr. Bistline: I am perfectly willing to stipulate that.

The Court: I don't see where that alters the situation.

Mr. Biggins: I believe in our conversation you characterized it as a more or less oral power of attorney, is that correct? Can I accept [16] that as a stipulation?

Mr. Bistline: Well, I don't think with regard to real estate transactions. I think the Court understands the situation.

The Court: I think it is a very natural situation for a father who is a lawyer and experienced in business transactions to counsel and advise his own child with respect to making business transactions. I don't think that is very unusual.

#### Cross-Examination

(Continued)

By Mr. Biggins:

I was released from active duty in May of 1947 from the Waves. I did not know at the time I separated from the Waves that I was going to get the gift of this property. I knew I didn't have to report income tax from my pay from the Waves. When I estimated my income tax for 1947 of approximately \$400 I didn't expect to get any land from my father. I didn't know my father was going to deed any lots to me when I made my declaration. I don't remember what income I expected to receive to pay such a tax on.

#### Redirect Examination

By Mr. F. M. Bistline:

I owned a certain piece of rental property consisting of four units at 269 Washington at that time.

The property included in the sale to Pocatello Heights and to Smith-Marshall Company or the Empire Investment was located on what we call the east bench in Pocatello, and at the time was sagebrush, hills, with absolutely no improvements on it whatsoever. There was nothing up there except sagebrush and some of the property was depleted [16-A]—gravel pit and there was just nothing. Several lots were in the gravel pit.

### Recross-Examination

By Mr. Biggins:

I can't remember within 50 lots how much property my father gave me in 1947. I knew I didn't have to make an estimate of the income from the bus company because that would be withheld. I didn't receive a deed to the Alameda property July 1, 1947. I received it before that. (At this point it was stipulated that plaintiff bought the 4-unit apartment at 269 Washington in 1940 at a Probate sale, and that the apartment property included in the July 1, 1947, deed was 353 Washington.)

I don't remember whether the taxes were paid on the property sold to Simplot or whether the taxes on the other property I received from my father were paid. I know the approximate location of most of the property. A good portion of it was on the east bench. I didn't know anything about Smith-Marshall Agency wanting to develop that area. I knew when they bought it that they had it in mind. It was common knowledge by everybody in town. I

knew when they went in and developed that it would probably enhance the value of my remaining holdings. With regard to the Albertson property, F. M. Bistline got the money and paid tax on it. It was right when this gift was pending and it was originally reported in my return but moved over to his and no protest was made on that.

I wouldn't say exactly that anything my father did with regard to these properties was all right with me. I can't think offhand of a single [17] instance where we didn't agree, but I want to make it clear that whenever these deals, these opportunities came up that we always had full discussion about them and that if he advised me and I thought it was a good thing to do I usually followed his advice because as I mentioned before I was inexperienced and naturally would rely on what he advised me. He wouldn't be able to tell these people whether or not the lots could be sold. We would talk it over and then decide whether or not it was the thing to do. It was usually the case that he talked to them and closed the sale after going over the matter with me. I can't offhand think of a single exception.

#### BEVERLY B. BISTLINE

recalled.

#### Redirect Examination

I made two sales in 1949. One was to a Mr. Lacy and one to Mr. Smith and Mr. Marshall, the latter being land located in what is now known as the College Terrace Addition. It was in connection with



the ground that was sold in 1948. It was all unimproved land and consisting of sagebrush, and gravel pit. There were a couple of blocks as I recall. The other sale to Mr. Lacy was under the circumstances that the Boise Payette Company called and made arrangements about it, and it was through them that the sale was made. I think it was four lots. I made one sale in 1950 to Mr. Whitaker out near his green house; it was one lot for \$400 I think. I don't recall any sales in 1951.

### Recross-Examination

By Mr. Biggins:

I haven't any idea how many lots I still own without refreshing my memory. In 1948 the Bise, Inc., corporation was organized, the purpose of [18] which was to put our income into it for the purpose of handling contracts, or any business that might come along. The corporation was formed in 1948. Contracts and mortgages on property were handled by the corporation. Not necessarily that which we sold. Maybe someone might have come in and asked to borrow money on their property. You might call it a finance corporation. I don't know the proper terminology. The corporation was a family business. As to whether the real estate dealings were pooled along the family lines, I told you before my father was my advisor in these business matters. (A copy of protest filed with the Internal Revenue Service was shown the witness.) It read in part: "This protest has been repared by F. M. Bistline."

Witness reads from document: Q. "The frequency of sales was due to an abnormal post was demanded for real estate in Pocatello and not due to any activity on the part of taxpayer or anyone for her. Pocatello experienced a population increase from 1940 of more than eight thousand which created an unusual demand for residence lots." I knew that to be a fact at the time I submitted the protest. This was common knowledge. The reason I did not employ real estate agents was because there was no reason to employ a real estate agent. It is true there was an abnormal demand. The community was growing at that time, and people were coming around to see me to buy the lots or my father. There was no need to employ real estate agents. I felt if there were any sales to be made we were perfectly capable to handle them. I knew if people wanted this property they would probably come around and look me up. [19]

#### ROLLAND SMITH

plaintiff's witness, being sworn, testified:

#### Direct Examination

I live at 375 Fanning, Idaho Falls. I am now and have been in the real estate, insurance and mortgage loan business for 15 years and at present have places of business in Pocatello and Idaho Falls. The name of the present organization is Mortgage Insurance Corporation, a corporation. It succeeded in the name of Smith-Marshall Agency, Incorporated, which in turn succeeded in the name of Bistline Realty Com-

pany, a corporation. I had an interest in the Bistline Realty Company which I acquired on December 31, 1945, from F. M. Bistline and J. M. Bistline, his father. I acquired a one-third interest from each. The remaining third was owned by Mrs. Paul Bistline, so that beginning January 1, 1946, I was the owner of two-thirds of the stock in the Bistline Realty Company and Grace Bistline was the owner of the other third. I was president and manager of that corporation. The name was changed to Smith-Marshall Agency in January of 1948 after Mr. Marshall had bought an interest in it. I have been associated with this business in some capacity as salesman or otherwise since 1939. I went to military service in 1942, and on my return bought out the two-thirds interest as stated above.

Before I went into the service in 1942 we had a "cardex" system of some lots owned by you (F. M. Bistline). We had no written listings, and there was no specified price put on them. After I came back—bought out the business and took over the control and management of it. Beverly Bistline never gave me any listings of property she had, and you did not. And you did not give [20] me any additional lots and descriptions. We still had the old book there. I recall a sale of some property of Beverly's to Mr. Peterson, and one to E. F. Brick. Those were in the book that was there before the war.

In 1948 Mr. Marshall and I became interested in the land which is now College Terrace. We were attracted to it in that I had always considered that area as having a desirable potential for residential

development and so interested myself to the extent of checking the county records to determine the ownership and found that the county had apparently taken tax deed on a number of lots up there. I don't recall the exact number, but I do recall it was approximately 20 acres of ground, and in checking the records, and along with my previous knowledge of the lots that you (F. M. Bistline) and Beverly owned in the area, we, or, I catalogued the ownership of all the lots that we were interested in on what is known as the east bench or College Terrace. Bannock County had the largest proportion, and the lots that the County owned were the most contiguous, so I asked the commissioners to put the land up for sale, for bid, and they subsequently advertised it and held a public sale and on behalf of a newly formed corporation known as the Empire Investment Corporation I bid the land in. As soon as I acquired title to the former county property and Empire Investment Corporation then I approached you to purchase several lots contiguous to the county property.

The terrain of this property I approached you with regard to buying [21] was: The property had been operated as a "batching" plant for a cement mixing outfit. The operator was a Mr. L. E. Reid and he had operated it since about 1937 or 1938, and had excavated practically all the area at some time or the other for the purpose of removing the gravel and the terrain was very uneven. There was some pits as deep as 50 or 60 feet below the level of the overburden that had been piled around the area.

We filled this property after acquiring it. The only fill was put in there was the excavation from the Pocatello Heights buildings, and, as I recall, there was about 20,000 yards of fill that came out of these excavations that went in there. The rest of the work necessary was leveling, grading, back-filling and removing these piles of dirt and leveling it out. The cost of this, I would say, was about \$15,000 initially.

I have been in the real estate business 15 years and have bought several lots and developed nine subdivisions with an average of about 200 houses in each subdivision and have sold about 1,800 lots in those deals. I have dealt in property all this time and I figure I am qualified to pass upon the value of vacant lots in Pocatello. A lot of these transactions were in Pocatello.

I have formed an opinion as to the market value of that property which we acquired from Beverly B. Bistline and the county as resident lots at the time we purchased it. My opinion is that it had no market value for residential lots. It was a part of the original townsite and it was zoned as residential property, and as residential property in the condition it was in [22] it had no market value. I would recognize this land from an aerial photograph. (Witness examined photograph, which was offered and received in evidence as Exhibit No. I without objection from counsel for the defendant.)

I can point out on Exhibit No. I the property I have been talking about that we purchased. I bought lots in 1948 from Beverly and some from you, and in 1949 you bought some more. (The Court at this

point suggested that the witness mark 1948 on the one and 1949 on the other and the witness did as requested.) I have indicated in blue pencil the area including the property which was acquired in 1948 and in red pencil the area which includes the property acquired in 1949. In both instances it includes other properties other than those which were specifically acquired from you and Beverly.

I have marked the Simplot property in blue pencil and there is no date on it. I don't recall trying to buy more of the ground in that neighborhood in 1948.

Before we sold this ground which we acquired we replatted it and as already stated filled and levelled it. We found a good market which I attribute to the influx of population and the natural growth. I think the marketability of that area in particular was that it afforded a view. It was contiguous to a very desirable developed residential area and I found very wide public acceptance. We named it College Terrace. It is near Idaho State College. We also put in sewers. If those improvements had not been done I do not think there would have been any market for that property during [23] 1948 and 1949 for residential purposes.

#### Cross-Examination

By Mr. Biggins:

I do not know whether Mr. Bistline had any visions of developing this area. I was dealing in vacant properties when I was working for the Bistline Agency. I don't recall any specific sales of

properties owned by Mr. Bistline prior to my acquisition of the business. We did have a book on file of the properties he held. If property was sold the office received the commissions. I was salaried. Commissions were paid on sales. It was my understanding the property was available for sale to anybody that might inquire. It was a cardex system, which includes some lots owned by Mr. Bistline. The card did not indicate the asking price of the lot. Only the legal description of the property was on the card. I knew who owned it because Mr. Bistline's name was listed as the owner. When inquiries were made I asked Mr. Bistline if he were interested in selling, and, if so, at what price and what terms. His office was in the rear of the real estate office part of the time, part of the time in the Dietrich Building.

After the two gifts deeds from F. M. Bistline to his daughter, Beverly, we were not advised what properties he owned as distinguished from his daughter. So far as I was concerned the F. M. Bistline properties were those set forth in that ledger. As to whether they were available for sale I didn't know whether or not they had been sold. The list so far as I was concerned was never maintained up to date. If somebody inquired of a lot in the book I had to call him to see if it had been sold already. I knew [24] those lots were available for sale. I did call him on a number of occasions after July 1, 1947, for instance, Mr. Peterson, and Mr. Lacy and perhaps some others. I was never informed that any of that property was taken off the market. All I did was call up to see if it was sold already, and if

we succeeded in getting a customer we got paid a commission. None of this property was advertised for sale by me after July 1, 1946. The only advertising I have ever done on vacant lots were properties I had a financial interest in. If it should develop from the testimony of Mr. Marshall, my associate, that some of the Bistline Agency signs were posted on vacant property that might belong to F. M. Bistline I would contradict that testimony.

I would contradict testimony of Marshall that they advertised through our agency lots belonging to F. M. Bistline in the Pocatello Tribune and Idaho State Journal. Mr. Bistline never told me not to advertise that property. The truth of the matter was not that the demand for that property was so urgent that we never had to advertise. The only difference in the way such lots was handled before the sale to me in January 1, 1946, was that after Mr. Bistline relinquished his interest in the business to me there was no effort on either of our parts to maintain an active catalog of the properties that he might have available for sale. We retained the list if we had an inquiry concerning one of those properties we would treat it just like any other brokerage transaction, in that, of course, if he was interested in selling [25] we would try to bring the purchaser and the seller together. I paid a money consideration, for Mr. Bistline's interest. I don't recall the exact amount. The president of the Bistline Realty Company prior to January 1, 1946, was F. M. Bistline, and its business was real estate brokerage, insurance, fire and casualty insurance. Mr. Bistline



was not an active participant of that corporation. I first worked for the company in April, 1939. The active manager was J. T. Doran. The only thing Mr. Bistline contributed to the operation of the agency was as a legal adviser. He was paid on a fee basis. He received no direct compensation. It came in the form of a participation and of profits.

### Redirect Examination

By Mr. Bistline:

I don't know whether the book that had the listing of various properties had any descriptions of the property in the old gravel pit or lying east of 15th Avenue. I know I didn't have any interest in those properties until after the war.

### Recross-Examination

By Mr. Biggins:

I would say that there was an abnormal demand for vacant lots around 1946, 1948 and 1949 in this community but not necessarily on account of the increased population. The fact people who otherwise would have been able to acquire a home were deprived during the war years probably had something to do with it. For awhile they couldn't build and when the war-time activities were released there was a burst of activity. But it was not necessarily the burst of activities that advertising was not necessary. One [26] of the reasons not much money is spent on advertising as far as vacant lots is concerned is because of the compensation involved. It

doesn't justify any advertising expenditure. The compensation is usually five per cent, and if someone wants a lot they will come in and inquire.

### BEVERLY BISTLINE

was recalled and testified as follows:

I was married to A. R. Spaulding on June 27, 1948. At the time of our marriage I owned the property a description of which has been read into the stipulation here as being the property given to me by gift from my father and mother. The marriage was dissolved by divorce on September 1, 1949. There was no agreement ever made between me and Mr. Spaulding with regard to this property that would in any way change its character from my own separate property. There was one other transaction in 1948 in which Mr. Spaulding was involved on a sale of real estate, that was his separate property and I had nothing to do with the same. I make no claim with regard to that.

Mr. Biggins: No questions.

(Plaintiff rests.) [27]

### DEFENDANT'S CASE IN CHIEF

#### F. M. BISTLINE

called as a witness on behalf of defendant, testified as follows:

The Bise, Inc., corporation was organized in 1948. It was to be a family holding corporation. It was never actually completed. We planned to turn the

contracts and mortgages in and take interest in debenture form. There was no real estate in that corporation except on the occasion when we made one bad loan and had to foreclose and we got three lots through the foreclosure and those were immediately deeded out to Beverly. The corporation was never completed. We did put the money into a bank account under the name "Bise, Inc.," and we kept a set of books during that period with all the contracts and everything in there. Grace Bistline was the holder of one share of stock—a dummy incorporator. She had no interest in it. She is the widow of my deceased brother. She is a stockholder in the Mortgage-Insurance corporation, formerly Bistline Realty Company. She is employed there now and has been since 1947. This corporation was not to take care of the financing of the property that was sold. The mortgages came from loans that we made from sales of property and from income from the bus company, we had a little money to invest.

I had sold quite a little property prior to 1946, and Beverly made [28] the sales involved in this case in 1947 and 1948. Most of the contracts were mine, some were Beverly's. We originally intended that these mortgages be held by the corporation, but I got scared on this personal holding company and I backed out of it pretty fast. We planned to put in future sales. I suppose perhaps I had a hope that we would make more sales. One never knows when he is going to sell real estate, particularly vacant real estate. I would have sold these parcels of

real estate if we could come to terms, but I want to make it clear that at no time did we ever go out and set prices on that property and endeavor to sell it. As to how the sales were made, take the Coates sale for example. He came into my office and said he had been over to the Court house and found out Beverly had several lots he would like to buy, and inquired and found out I was her father, and he thought he would come up and talk to me about it, and he wanted to know if we would be interested in selling it, and I told him I thought we would be interested in selling it. Those are not the exact words. I naturally would use the word "we" in the family. As to discussing the price, I generally ask the other fellow to name his price first, that is what he would be willing to offer. It makes it a little easier because he might offer more than I would have sold the lot for, and I was trying to get all I could out of them. I couldn't accept for Beverly without her approval. I would tell them I would talk it over with her, and I never had any trouble with them coming back. My daughter had considerable confidence in my judgment. I couldn't sell without her approval. I [29] couldn't sell her property. I don't recall any cases where I recommended a sale that she disapproved of. All taxes were paid on the property Beverly sold to Simplot's at the time she sold them.

I bought the property which Beverly sold to Simplot in 1939, and while I thought I saw a very nice piece of property there that could be developed into a residential district, at the same time due to

the character of the property and its raw condition and big holes in the ground and so forth I was very doubtful if I would ever be able to sell it, consequently I did not pay any taxes on it until 1943, and in 1943, the main reason I paid my taxes on it was because I was in the bus business and I got a very lucky break with an air base here, gasoline rationing, and I was looking for income tax deductions, and I went over and paid about \$4,000 worth of taxes on that and other property. Beverly paid all the taxes on this after I deeded it to her.

I could afford to have put in curbs and gutters like Smith-Marshall did. I had more capital than they did, but I was not interested in retail development of subdivisions. I have only been interested in selling vacant lots as an investment. I have found it to be very good investing to buy properties at a low price and hold them until become of value. You can't drum up sales for vacant properties no matter how much you advertise. During the years 1938 and 1941 you could buy lots in this town for \$50.00 on up to \$100.00 and very choice lots, and you couldn't sell them for \$50.00 or \$100.00 unless somebody wanted them you could advertise full [30] page ads every day and I don't think you would. I didn't advertise my lots for sale because I wasn't interest in advertising. I wasn't interested in any particular fast sale of these lots. I have another good reason for that. During some of those years the bus business was awfully good and they had me up in an income tax bracket where I wasn't interest in sell-

ing and paying additional tax. I owned some of these properties in common with one A. Y. Satterfield in undivided half interests. I could sell my interest and he could sell his. He went into the real estate business. I had nothing to do with that. Paul Evans and I also had some property in common in undivided half interests. He is a licensed real estate broker. I was president of the Bistline Realty Company until December 31, 1945. I never gave a thought about the book with the description of the lots in it being there after I sold out. Smith-Marshall came to see me very frequently and also other real estate dealers and asked me to give them listings of my property and they didn't get them.

#### WENDELL MARSHALL

called as a witness by defendant, being first duly sworn, testified as follows:

I live at 248 South 15th, Pocatello, I am a real estate broker, and have been since 1947. I returned to Pocatello in 1935. I am acquainted with one Roland Smith and was in business with him as a commission from 1947 through 1948 and then a stockholder from that time until 1951.

While working for that company I recall having handed some [31] property of F. M. Bistline's for sale. As to whether any of that property was advertised for sale there was some advertising in our regular classified advertising as to vacant lots.

It would read something like this: "Lots for sale in northeast section of the City of Pocatello" and

then that would be about the extent of it. It wasn't extensive advertising, no large promotions or anything, but it was included without advertising of residence and that sort of thing. We posted some for sale signs on some of these properties. I can't recall that I posted a sign on the property Mr. Brick bought. I recall placing a sign on a lot on North 14th in the 300 Block. There was a group of six lots in that group. That is the one sign I recall being on a lot, other than that I don't recall any signs on Mr. Bistline's properties. The sign read Bistline Realty for sale, and giving the phone number and address. As a result of these signs and some of these classified advertising inquiries were sometimes made to purchase those lots and we sold several of them and received a commission.

### Cross-Examination

By Mr. Bistline:

We didn't have any written listings on any of that property. The only authority we had from Beverly B. Bistline to put this sign on the lots was only in that they were verbal listings in the office, and of course, any listing we generally place the sign in—Beverly never gave us any listings, the listing were all given by you, and the book that had the listings in was in the office when I came in, and was never added to. We revised it. There were additions of properties while I was there, for [32] example this group of six lots is an example. I believe that was an addition because as I recall there were some title problems that had to be cleared up

before it could be sold, and it was added after that. It had had a ditch running by it, but I believe it had been covered at the time I started. I recall that I asked you for additional listings, there was quite a little activity, and we were soliciting properties for sale, yes. I don't recall specifically. Yes, I asked you for listing. I didn't get any written listings. As to getting listings on any properties other than those that were in that book, I can't recall exactly what was in the book. None of the lots that Mr. Smith and I bought from Beverly and you in what became later College Terrace Addition were in that book. And it did not contain a listing of any of the lots that the Simplot people bought in Pocatello Heights. I took it upon myself to go out and put those signs on the property without asking you, inasmuch as they were listed in the office we proceeded with the normal sales procedure which on a vacant lot generally includes placing a lot and advertising or what other methods you can.

I handled the Peterson sale. I recall them coming in. And after they contacted me I sold them the property and proceeded with the sale. I called you to ask what price to put on them. We always had to do that because they were verbal listings and subject to change and we [33] had to check before a sale could be made. I added my commission to it.

In running advertisements of lots in the paper I never described any lots that were owned by Beverly. We didn't describe them as individual lots and give ownerships. We ran the advertisements



with the hope we might find some customers and then we could expect to contract you with regard to the sale, or anyone else if we found customers in that part of time, we would try to find the owner and make a sale.

We tried to get exclusive listings. We always try to do that. We couldn't get an exclusive listing. But we got a verbal listing.

### Recross-Examination

By Mr. Bistline:

I didn't get any listings from you. I used the book that was in the office. Those were considered to be listings in the office. The book was there when I came in. I personally didn't get any exclusive listings from you although I asked you for them from time to time. I can't recall any specific instance of getting any listings from you for myself or the office.

### REBUTTAL

#### BEVERLY B. BISTLINE

recalled as a witness by plaintiff testified as follows:

Mr. Bistline: At this time the plaintiff moves to reopen her case.

The Court: Very well, you may reopen with the right of the Government to rebut it.

(Whereupon, plaintiff reopened.)

A. Since yesterday I have checked my investments to ascertain [34] what became of the proceeds

of the sale of the property involved in this case, and I find that it has been reinvested in other property and mainly in stocks, mortgages, contracts and such investments as that. I have approximately \$36,000 in contracts and mortgages. My stock investment is about \$10,000. And I have roughly about \$10,000 left in real estate.

### Cross-Examination

By Mr. Biggins:

As to the value of the real estate I got as a gift from my father at the time he gave it to me. I would have to refresh my memory on it. I don't know just off hand. There have been sales made on some of the real estate given to me. I don't know the exact number of lots that aggregates the \$10,000. I would have to check that. I arrive at the \$10,000 valuation by estimating the present value of the number of lots that I have. I am not sure exactly how many. I made the estimate with the advice of my father. The real estate contracts were the result of real estate sales. The mortgages went to people who came in to borrow money. My father was acting as my advisor to make investments for me and as such money was available to my father for loans. Some of the \$36,000 is in mortgages and some of it is in contracts. I wouldn't say that I have had many more mortgages than I have now. As a result of the real estate sales we have had money to invest in loans and other property and other investments. F. M. Bistline didn't use any of

of the \$15,000 from the Simplot sale when the bus company was in need of funds, [35] so far as I know. I think I told you yesterday that money was given to my father to use for me in investments and paying taxes on property. I don't know whether I said that I didn't know what he did with it. He wasn't using it in his business. It was given to him by me to use for purposes to invest.

He has never given me a written accounting. We have discussed, on an informal basis. We talk things over. My father is familiar with the stock market and does my investing for me. My father acts as advisor counsel, business counsel. I rely on my father's good advice on what stocks to buy. As to your question as to whether he is an agent. I won't say agent, no. He is my advisor and counsel in these business matters.

#### Examination

By Mr. Bistline:

I have seven lots behind the Simplot apartments, I figure they are of a value of \$2,500. The lots on 19th Avenue, I think about \$3,000 on those. Then I have quite a number of miscellaneous lots that are unimproved that I lumped off at approximately \$10,000.

#### Examination

By Mr. Biggins:

I have some property valued at \$3,500.00. If somebody came in my father's office today and asked to buy them for \$3,500 I can't say exactly

whether I would sell them for that price. We would have to talk it over. That is roughly the value I put on them. Probably we would sell them for that price. We would have to talk it over and decide whether that was the terms we could come to. And this lot which you say I said was worth [36] \$2,000, the same would be true if we could come to satisfactory terms. By terms, I don't necessarily mean the down payment or the sales price. It takes a lot of things to make a sale. When I say the lot is worth \$2,000 I possibly may mean that I would sell it for that price, but I may not want to sell it.

(Plaintiff rests.)

Mr. Biggins: No surrebuttal.

Appellant submits and files the above and foregoing as a true, full, correct and complete narrative summary statement of all of the testimony offered or received, and all the proceedings had in the trial court at and in connection with the trial of said cause, for use upon her appeal taken to the United States Court of Appeals for the Ninth Circuit.

Dated this 20th day of August, 1957.

/s/ F. M. BISTLINE,

/s/ R. D. BISTLINE,

Attorneys for Appellant.

[Endorsed]: Filed August 26, 1957.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Motion to add A. R. Spaulding as party plaintiff.
3. Order adding A. R. Spaulding as party plaintiff.
4. Summons and Return of Service on A. R. Spaulding.
5. Answer.
6. Memorandum Opinion.
7. Findings of Fact and Conclusions of Law.
8. Judgment.
9. Notice of Appeal.
10. Statement of Points to Be Relied Upon by Appellant.
11. Narrative Statement of Testimony and Proceedings.
12. Designation of Matters to Be Included in Record on Appeal.
13. Plaintiff's Exhibit No. 1.



In the United States Court of Appeals  
for the Ninth Circuit

No. 15716

BEVERLY B. BISTLINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE  
RELIED UPON BY APPELLANT.

Following is a concise statement of the points upon which plaintiff-appellant, Beverly B. Bistline, intends to rely on the appeal of the above-entitled cause:

1. The District Court erred in entering judgment denying appellant the right accorded by the Statutes in such cases made and provided to pay her income tax on one-half of the gain realized by her on the sale to the Empire Investment Company, a corporation, in one transaction, of the hereinafter described real estate which was acquired by her donors in 1939 and deeded to her in 1947, the sale price of same being \$1900.00 and the net gain to her or \$1800.00, which real estate is particularly described as follows:

Lots 4-17 inclusive in Block 2,

Lots 1 and 3 of Block 3,

Lots 5, 6, 7 and 10 and 13-19 inclusive of

Block 54, and all of Block 6, all in Pocatello  
Townsite, Bannock County, Idaho,

for the reason that the evidence is conclusive that said property was not held for sale by said plaintiff to customers in the ordinary course of her trade or business, with particular emphasis on the fact that said property consisted of lots zoned residential and their physical condition was such that they were not marketable as that class of property.

2. The District Court erred in entering judgment denying appellant the right accorded by the Statute in such cases made and provided to pay her income tax on one-half of the gain realized by her on the sale to the Pocatello Heights Apartment Corporation, in one transaction, of the hereinafter described real estate which was acquired by her donors in 1939 and deeded to her in 1947, the sale price being \$16,400.00 and the net gain to her, \$14,900.00, which real estate is particularly described as follows:

Blocks 44, 26 and 27 and lots 19 and 20 of  
Block 21 of Pocatello, Townsite,

for the reason that the evidence is conclusive that said property was not held for sale by plaintiff to customers in the ordinary course of her trade or business, with particular emphasis on the fact that sales of building sites from said tract had theretofore been rejected, and that the same had been withheld from the market with a view to possible future development and was sold only because of the spe-



cial occasion of the apartment project being built on same in the public interest.

3. The District Court erred in entering judgment denying appellant the right accorded by the Statutes in such cases made and provided to pay her income tax on one-half of the gain realized by her on the following sales of real estate:

Lots 19 and 20 in Block 356 of Pocatello Townsite to Kenneth Draper for \$1500.00 for a net gain of \$1400.00, same having been acquired by her donors in 1937 and deeded to her in 1947.

The South One-half of Lot 9 and 10 in Block 274 of Pocatello Townsite to Thomas J. Coates for \$1000.00, for a net gain of \$950.00, same having been acquired by her donors in 1939 and deeded to her in 1947.

Lot 17 and the South One-half of Lot 18 in Block 519 of Pocatello Townsite to Albert Anderson for \$1000.00 and a net gain thereon of \$700.00, same having been acquired by her donors in 1945 and deeded to her in 1947,

for the reason that the evidence is conclusive that they were not held by plaintiff for sale to customers in the ordinary course of her trade or business with particular emphasis on the fact that there is no evidence that plaintiff was seeking a market for the same and that the sales in each instance were made by reason of the purchasers looking up the property first, and then looking up plaintiff.

4. The District Court erred in entering judgment denying plaintiff the right accorded by the Statutes in such cases made and provided to pay her income tax on one-half of the gain realized by her on the following sales of real estate:

Lots 12-14 inclusive Block 50 of Pocatello Townsite to H. A. Peterson for \$2,100.00 for a net gain of \$1898.75, same having been acquired by her donors in 1940.

South One-half of Lot 6 and all of Lot 7 in Block 52 of Pocatello Townsite to Edward F. Brick for \$750.00 and a net gain of \$550.00 same having been acquired by her donors in 1939,

for the reason that there is not evidence in the record sufficient to establish that said property was sold by plaintiff, or held by her for sale to customers, in the ordinary course of her trade or business with particular emphasis on the facts that if there was a listing of either of these properties with the real estate firm that interceded in the sale that it was without knowledge on the part of plaintiff, that the sales were made by reason of the purchasers seeking the property without any effort on the part of plaintiff, that nothing was done by way of improvements on said lots to attract buyers; and that the element of frequency is lacking.

5. The District Court erred in entering judgment denying appellant the right accorded by the Statutes in such cases made and provided to pay her

income tax on one-half of the gain realized by her on each of the sales, which are the subject matter of this action for the reason that there is not sufficient evidence in the record to establish that such property was sold by plaintiff, or held by her, for sale to customers in the ordinary course of her trade or business.

/s/ F. M. BISTLINE,  
/s/ R. D. BISTLINE,

Attorneys for Plaintiff-Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 30, 1957.

[The text on this page is extremely faint and illegible. It appears to be a list or a series of entries, possibly a table of contents or a list of items, but the specific details cannot be discerned.]



